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Evidence on use of Dynamic Purchasing Systems in the United Kingdom (UK)

Ama Eyo*

1. Introduction

In the United Kingdom, the Dynamic Purchasing System (DPS) is gradually emerging as a popular tool for regulated procurement. The tool has become particularly relevant, as many authorities see it as offering them a dynamic and flexible engagement route to meet their requirements.¹ Focusing on the rules on DPS in the previous European Union (EU) public procurement directives,² the rules on DPS in the current EU public procurement directives³ and evidence from contracting authorities on their experiences with DPS, this article seeks to contribute to the existing literature on DPS.⁴ The discussion extends the analysis beyond the existing doctrinal discussions, by drawing upon the experiences of contracting authorities to argue for enhanced reform to the legal rules and practical guidance on aspects of DPS operation that remain unclear.

The rest of the article proceeds as follows. First, to set the context for the research, section 2 reviews the legal regime on DPS under the repealed 2004 procurement directives, including weaknesses identified with the old rules. Section 3 examines how the current rules on DPS address these weaknesses. Section 4 then presents empirical data on the use of DPS in the UK, to illustrate the transformative changes taking place with the mechanism, including the

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¹Islington Council, “Procurement Strategy – A Dynamic Purchasing System for Learning Disability Accommodation and Support Services”, April 2017, available at <http://democracy.islington.gov.uk/documents/s11483/Procurement%20Strategy%20Learning%20Disability%20Accommodation%20and%20Support%20Services.pdf>

² Article 33, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J.L 134/114; and Article 15, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] O.J.L 134/1.

³ Article 34, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] O.J.L 94/65; and Article 52, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] O.J.L 94/243.

⁴ See generally, R. Bickerstaff, “E-procurement under the new EU procurement Directives” [2014] PPLR 134; A Sánchez Graells, *Public Procurement and the EU Competition Rules* (2nd edn, Hart Publishing 2015) 363; A Semple *A practical guide to Public Procurement*, OUP, 2015, p.89; C Hamer, “Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies” [2014] PPLR 201; T Millet, “Electronic Procurement: Modernising the Public-Private Interface” [2007] 2 Eur. Pub. Private Partnership L. Rev. 244.

challenges experienced in practice and some suggestions for improving the rules to enhance DPS practice. Section 5 makes some recommendations on initiatives that contracting authorities can adopt to address identified challenges to DPS implementation.

2. DPS - looking back to 2004

A DPS is a fully electronic procurement approach for setting up and maintaining a list of providers, which can be used by contracting authorities to award “commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities”.⁵

Defined in Article 1(6), Directive 2004/18/EC and Article 1(5), Directive 2004/17/EC, the DPS is ‘*a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification*’.

The concept of a DPS was introduced into EU procurement regime under the 2004 EU procurement directives - Article 33, Directive 2004/18/EC, and Article 15, Directive 2004/17/EC, in recognition of the tool’s potential ‘to increase competition and streamline public purchasing, particularly in terms of the savings in time and money.’⁶ Article 33(1) of Directive 2004/18/EC and Article 15(1) of Directive 2004/17/EC allowed Member States to make DPS available to their contracting authorities. The rules contained additional provisions which required contracting authorities to follow defined procedural steps and timelines when they set up and operate DPS. The rules focused on ensuring that in operating DPS, contracting authorities would comply with the principles of equal treatment, non-discrimination and transparency.

A feature of the previous procedural rules was that contracting authorities had to organise DPS by using the open procedure, to first set up the system to admit qualified providers unto the system, and then organise competition for individual contracts between these providers.⁷

⁵ Article 34 of Directive 2014/24/EU, and Article 52 Directive 2014/25/EU.

⁶ Recital 13, Directive 2004/18/EC; and Recital 21, Directive 2004/17/EC.

⁷ Article 33 (2) of Directive 2004/18/EC; and Article 15 (2) Directive 2004/17/EC.

Underpinning the rules, was the requirement for authorities use electronic means capable of ensuring unrestricted, direct and full access to the specification and to any additional documents to providers to set up and operate the system.⁸

To set up the system, contracting authorities were required to publish this information in a contract notice on the Official Journal of the European Union (OJEU).⁹ The rules required that in the notice contracting authorities state the purpose as the establishment of a DPS.¹⁰ The notice served to support contracting authorities in complying with the EU principle of transparency. The rules placed additional obligations on contracting authorities in relation to the notice. Specifically, the authorities were required to include the internet address where providers could access the procurement documents (including the specification and any additional documents), the ‘nature of the purchases envisaged under the system’, and the electronic equipment for the DPS, including the technical connection arrangements.¹¹

In response to the notice, interested providers would submit indicative tenders on the electronic portal to signify their interest to join the system. Under the rules, providers had to return their responses within at least fifty-two days from the publication of the notice.¹² This period aligned with the minimum time limit for the receipt of tenders for the open procedure under the old directives. However, the minimum period could be reduced in certain cases. For instance, it could be shortened by seven days where the contract notice was transmitted to the OJEU using electronic means, and by a further five days in circumstances where the contracting authority provided electronic access to the specification. Thus, where contracting authorities used electronic options, they could potentially benefit from significant reductions in time scales, which could reduce the minimum period for providers to return their indicative tenders to forty days.¹³

After the submission of responses by providers, contracting authorities would evaluate the indicative tenders. Under Article 33(4) of Directive 2004/18/EC and Article 15(4) of Directive 2004/17/EC, contracting authorities were required to complete the evaluation within a

⁸ Article 33 (3) (c) Directive 2004/18/EC; and Article 15 (3) (c) Directive 2004/17/EC.

⁹ Article 33 (3) Directive 2004/18/EC; and Article 15 (3) Directive 2004/17/EC.

¹⁰ Article 33 (3) (a) of Directive 2004/18/EC; and Article 15 (3) (a) Directive 2004/17/EC.

¹¹ Article 33 (3) (b) and (c), Directive 2004/18/EC; and Article 15 (3) (b) and (c), Directive 2004/17/EC.

¹² Article 38(2) Directive 2004/18/EC; and Article 45 (2) Directive 2004/17/EC.

¹³ Article 38 (5) and (6) Directive 2004/18/EC; and Article 45 (5) and (6) Directive 2004/17/EC

maximum period of fifteen days, and to notify providers of their outcome on completion of the evaluation. The rules permitted the contracting authority to extend this evaluation period provided that the authority had not issued any invitation to tender during the evaluation.¹⁴

On completing the evaluation, the contracting authority was required to notify providers of the outcome of the evaluation at the earliest possible opportunity.¹⁵ Presumably, this requirement sought to ensure that providers were promptly informed about the success or otherwise of their indicative tenders. If a provider satisfied the selection criteria and submitted a compliant indicative tender, the contracting authority would admit the provider unto the system, and the provider would be eligible to participate in future specific contract opportunities announced by the authority. Where a provider failed to meet the selection requirements or in cases where its indicative tender was non-compliant, it could still take part in further calls for admission to join the system, and if it succeeds would be added to the system

After setting up the system contracting authorities could not simply proceed to award contracts to providers admitted to the system, as there were additional requirements which the authorities had to follow to place individual contracts through the system. As a first step, and to allow new providers to be added to the system, under Article 33(5) of Directive 2004/18/EC and Article 15(5) of Directive 2004/17/EC, the contracting authority was required to advertise the existence of the system using a simplified OJEU contract notice, specifically designed for a DPS. This notice served to inform new providers of the existence of the system and, the steps they could follow if they wished to join the system. Any new provider, including providers who may have been unsuccessful when the system was initially set up, could respond by submitting indicative tenders within at least fifteen days from the date of despatch of the simplified notice.¹⁶ Upon receipt of the indicative tenders, contracting authorities were required to evaluate the indicative tenders within a maximum period of fifteen days from the date of submission of the indicative tender. Again, some flexibility existed under the rules for contracting authorities to extend this period provided the contracting authority had yet issued any invitation to tender.¹⁷ After the evaluation, any provider with compliant indicative tender and which met the selection criteria was added to the system.

¹⁴Article 33(4) of Directive 2004/18/EC and Article 15(4) Directive 2004/17/EC.

¹⁵Article 33(4) of Directive 2004/18/EC and Article 15(4) Directive 2004/17/EC.

¹⁶Article 33(5) of Directive 2004/18/EC and Article 15(5) Directive 2004/17/EC.

¹⁷Article 33(4) of Directive 2004/18/EC and Article 15(4) Directive 2004/17/EC.

In order to award a specific contract through the DPS, Article 33(5) of Directive 2004/18/EC and Article 15(5) Directive 2004/17/EC stipulated that each contract was to be the subject of an invitation to tender. To comply with this requirement, the contracting authority would issue invitations to tenders for the respective contracts to all operators admitted to the system.¹⁸ To provide authorities with flexibility, the old rules did not set any time limit for the period within which providers were required to submit tenders or for contracting authorities to evaluate submitted tenders. These matters were left to the discretion of each contracting authority, as individual contracts demand different treatments. The only direction in the rules was that provided under Article 33(6) of Directive 2004/18/EC and Article 15(6) Directive 2004/17/EC, which stipulated that after evaluating the submitted tenders, the contracting authority was to award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the DPS.

It is worth noting that the rules on DPS in the old directives were expected to secure benefits from the mechanism for contracting authorities and the supply community. For instance, as a DPS is conducted using electronic means, contracting authorities and suppliers should have benefitted from the advantages of e-procurement, such as reduced timescales, increased competition and streamlined public purchasing. For contracting authorities, the mechanism should have provided them with access to pre-selected tenderers and a continuous stream of new providers on ongoing basis.¹⁹ Potentially, the mix and number of providers could ensure better competition for regulated contracts. Beside this, as part of the selection process would have been completed and all that would have remained was competition for individual contracts, the contracting authorities should have benefited from faster turnaround for the procurement. Thus, Sanchez-Graells, notes that it is a “system mainly oriented towards speeding up the procurement process and reducing the administrative burden in cases of repeated procurement of goods, works and services that can be specified in sufficient detail upfront and for which participating operators can easily submit a tender for each specific procurement.”²⁰ For the supply community, potentially DPS offer them multiple opportunities to access regulated contract opportunities. Thus, unlike frameworks agreements and block

¹⁸Article 33(6) of Directive 2004/18/EC and Article 15(6) Directive 2004/17/EC.

¹⁹PWC/Ecorys, “Public procurement in Europe Cost and effectiveness2, available at http://www.eipa.eu/files/topics/public_procurement/cost_effectiveness_en.pdf, p.95

²⁰ Sanchez Graells, (n4), p.365.

contracts, which lock out unsuccessful providers, when authorities use DPS unsuccessful providers have many opportunities to access contract opportunities, as a provider which fails to get admitted on the system, can reassess the reason for its failure, and re-position itself and re-apply to join the system.

Unfortunately, the rules on DPS failed to deliver the anticipated benefits, as weaknesses in the various provision dissuaded practitioners from setting up and operating DPS. This was observed by the Crown Commercial Service (CCS) – the executive agency responsible *inter alia* for leading on procurement policy on behalf of the UK government. As part of its consultation exercise for the 2014 procurement directives, CCS concluded that “flawed and unnecessarily onerous procedural rules” deterred many practitioners from deploying DPS.²¹ It also commented that the requirements in Article 33(5) of Directive 2004/18/EC made conducting DPS under the old rules “extremely slow and inefficient”.²² Earlier in 2011, the European Commission had established that there was very marginal use of the mechanism across Member States due to lack of clarity in the 2004 rules on DPS.²³ Evidence from the PWC/Ecorys study conducted in the same year showed that in the very limited instances where DPS was used, it resulted in high costs for authorities,²⁴ and was significantly more time-consuming than other types of procurement.²⁵

Before these findings, scholars had commented on the negative impacts created by some requirements in the old rules for DPS practice.²⁶ For instance, Arrowsmith in her evaluation of the rules remarked that the requirement for a contracting authority to advertise each specific tender (including low value tender) for the purpose of receiving indicative offers from interested providers not yet registered on the system significantly delayed the process of

²¹ United Kingdom response to the European Commission Green paper on the modernisation of EU public procurement policy (COM (2011) 15 final), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61554/0707UKGPpbResponsefinal_20_2_.pdf

²² *ibid*

²³ European Commission, “Staff Working Paper - Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation”, SEC (2011) 853 final

²⁴ PWC/Ecorys, (n20), p.53.

²⁵ PWC/Ecorys, (n20), p.103.

²⁶ S. Arrowsmith, “Dynamic Purchasing Systems under the New EC Procurement Directives - a not so dynamic concept” [2006] Public Procurement Law Review p. 16-29; R. Beuter, European Public Procurement Reform: main innovations in the Public Sector Directive – a Preliminary Assessment, available at http://www.eipa.eu/files/repository/product/20071025171611_Scope2005_3_1.pdf; M. Varney, “E-Procurement - current law and future challenges” (2011) 12 ERA Forum 185; M. Varney, F. Lichere and S. Richetto, “Framework Agreements, Dynamic purchasing systems and public e-procurement” in F. Lichere, R Caranta and S. Treumer (eds.), *Modernising Public Procurement: the New Directive*, Djof Publishing, 2014.

completing DPS and introduced transactional costs.²⁷ To remedy the situation, she suggested that the requirement should be removed and replaced with a system which would permit contracting authorities to award individual contracts based on offers that appear on the system at the time of the offer, without the need for the additional notice for individual contracts.²⁸

3. DPS under current EU procurement rules

In 2014, the EU adjusted the rules on DPS to simplify the process of setting up and operating the mechanism, through provisions in Article 34, Directive 2014/24/EU and Article 52, Directive 2014/25/EU. These rules are implemented in the UK in the Public Contracts Regulations 2015²⁹ and Utilities Contracts Regulations 2016.³⁰ The provisions on DPS in the UK procurement regulations largely reflect the provisions on the mechanism in the 2014 EU procurement directives, although they are presented more sequentially in a manner which promotes greater clarity than the provisions in the directives. The CCS introduced guidance on DPS (last updated in October 2016) to support authorities which may wish to use DPS.³¹

A key innovation in the 2014 rules on DPS is that unlike the position under the 2004 rules, whereby contracting authorities had to follow the open procedure to establish DPS³², under Article 34 (2), Directive 2014/24/EU and Article 52 (2), Directive 2014/25/EU, contracting authorities are required to set up and operate DPS by following the rules of the restricted procedure in all its phases up to the award of the contract. However, in a departure from the general rules on operating the restricted procedure under provisions in the current directives,³³ when contracting authorities adopt the restricted procedure to set up a DPS, they are not permitted to put any limit on the number of operators to include on the system. Thus, Article 34 (2), Directive 2014/24/EU and Article 52 (2), Directive 2014/25/EU, specify that the contracting authority is required to admit to the system, *all* the candidates that satisfy the selection criteria without limiting the number of candidates as can ordinarily occur when

²⁷ S. Arrowsmith, “Modernising the EU’s public procurement regime: a blueprint for real simplicity and flexibility” (2012) 21 Public Procurement Law Review 71-82.

²⁸ *ibid.*

²⁹ Regulation 34, Public Contracts Regulation 2015 (SI 2015/102).

³⁰ Regulation 52, Utilities Contracts Regulations 2016 (SI 2016/274).

³¹ Crown Commercial Office, “Dynamic Purchasing System”, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560265/Guidance_on_Dynamic_Purchasing_System_-_Oct_16.pdf, accessed 31 May 2017.

³² Article 33 (2) of Directive 2004/18/EC; and Article 15 (2) Directive 2004/17/EC.

³³ Article 28, Directive 2014/24/EU; Article 46, Directive 2014/25/EU

authorities deploy the restricted procedure.³⁴ Further, there are some qualifications to general time limits for applying the restricted procedure in the context of DPS.³⁵

Similar to the position in 2004, the rules on using the DPS under the 2014 procurement rules require that contracting authorities set up and operate DPS in two phases using electronic means.³⁶ The first phase involves establishing the system and admitting initial providers onto the system. To commence this phase, the authority issues a call for competition using electronic means. As was also the position under the 2004 procurement rules, under the 2014 procurement rules the call for competition must clearly state that the contracting authority intends to establish a DPS.³⁷ Similar to the position under 2004 procurement directives, the current rules also require that the procurement documents should as a minimum include certain information such as the nature of the envisaged purchases, and all the necessary information concerning the system itself, such as the electronic equipment and its technical connection arrangements and specifications.³⁸ The document must also indicate if there would be any division of the requirement into categories or lots and any defining characteristics.³⁹ The directives permit this division in order to further the possibilities for SMEs in the system, especially when contracting authorities set up large-scale DPS.⁴⁰

Unlike the position under the 2004 rules where interested providers had to submit indicative tenders if they wished to join the system, the current rules require interested providers to submit pre-qualification documents for admission to the system within thirty days from the date of the call to competition.⁴¹ On receipt of the requests to participate, and within a period which should ordinarily not exceed ten working days following the receipt of the requests, the contracting authority is required to assess the indicative tenders.⁴² The assessment must be based on the selection criteria set by the authority.

As it may not always be possible for the authority to complete the evaluation of requests to participate within the ten days evaluation period, in duly justified cases, the rules provide for

³⁴ Article 65, Directive 2014/24/EU; Article 78(2), Directive 2014/25/EU.

³⁵ Article 34 (2), Directive 2014/24/EU; Article 52 (2), Directive 2014/25/EU.

³⁶ Article 34 (3), Directive 2014/24/EU; Article 52 (3), Directive 2014/25/EU.

³⁷ Article 34 (4) (a), Directive 2014/24/EU; Article 52 (4) (a), Directive 2014/25/EU.

³⁸ Article 34 (4) (b), Directive 2014/24/EU; Article 52 (4) (b), Directive 2014/25/EU.

³⁹ Article 34 (4) (c), Directive 2014/24/EU; Article 52 (4) (c), Directive 2014/25/EU.

⁴⁰ Recital 66, Directive 2014/24/EU; Recital 75, Directive 2014/25/EU.

⁴¹ Article 34 (2) (a), Directive 2014/24/EU; Article 52 (2) (a), Directive 2014/25/EU.

⁴² Article 34 (5) Directive 2014/25/EU; Article 52 (5) Directive 2014/25/EU.

the possibility for contracting authorities to extend the evaluation period beyond the ten days, provided the contracting authority has not yet issued any invitation to tender for the first specific procurement under the DPS.⁴³ This may be accepted for instance, when in the process of setting up a new DPS, the contracting authority is faced with large numbers of requests to participate, such that more time is required for evaluation of these requests. Another situation is where the authority may need additional time to examine additional documents to verify whether the providers have met the selection criteria.⁴⁴ In these situations, the rules require the authorities to indicate in the procurement documents the length of the extended period which they intend to apply.

After the evaluation, the contracting authority decides whether or not to admit the provider to the system and is required to inform the providers “at the earliest possible opportunity” on whether or not they have been successful.⁴⁵ Unfortunately, as discussed below, the language in this provision is imprecise, and as suggested in the discussion below, the provision could benefit from some improvement.

After admitting initial providers to the system, new providers can apply to join the system at any time during the life of the system, as the nature of the DPS is that it must be kept open throughout its lifetime for new providers to join. Thus, Article 34 (5) Directive 2014/25/EU; Article 52 (5) Directive 2014/25/EU, specifically provide that “contracting authorities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system. As mentioned, in a change to the old rules, there is no longer the need for the authority to receive and evaluate indicative tenders. What is required is for contracting authorities to offer unrestricted and full direct access, as long as the system is valid, to the procurement documents so that interested providers can access the procurement documents and return their requests to participate to join the system. There is some flexibility as to how the authority can organise and assess these requests. This is catered for by recital 64 of Directive 2014/24/EU and recital 74 of Directive 2014/25/EU. The provisions state that contracting authorities are “free to organise the way in which they intend to examine the requests for participation, for instance by deciding to conduct

⁴³ Article 34 (5) Directive 2014/25/EU; Article 52 (5) Directive 2014/25/EU.

⁴⁴ Article 34 (5) Directive 2014/25/EU; Article 52 (5) Directive 2014/25/EU.

⁴⁵ Susie Smith, “Procurement Byte: Dynamic Purchasing Systems (DPS) 2 – Setting up a DPS2 available at <https://www.bevanbrittan.com/insights/articles/2016/procurement-byte-dynamic-purchasing-systems-dps-2-setting-up-a-dps/>, accessed 31 May 2017.

such examinations only once a week, provided the deadlines for the examination of each request of admission are observed”. Contracting authorities consulted in the course of this research indicate that their electronic portal is configured to provide them with alerts once a new application/requests has been submitted. Respondent #18 mentioned that in their organisation, they engage in the evaluation every Monday, while Respondent #14 stated that the requests are evaluated as they are received because the contracting authority has allocated personnel to performs the evaluation. Presumably, the requirement to assess requests to participate within ten days from the receipt of the requests also applies to the requests to participate, submitted after the DPS is set up.

The second phase of operating a DPS occurs when the authority places individual contracts with providers admitted on the system. As mentioned, in a change to the old rules, there is no longer the need for the contracting authority to publish simplified notices for these call off contracts. Authorities can simply issue invitations to all providers, or in cases where the system has been divided into categories, the providers admitted to the respective category/ies. The rules require that the authority should indicate the return date for the submission of these tenders which should be a minimum of ten days from the date on which the invitation to tender is sent out to providers on the system.⁴⁶ Ostensibly, these reduced time limits should speed up the process of setting up and operating DPS, and possibly address some of the concerns identified in the literature about the mechanism being long drawn-out. However, when setting the date for providers to return their tenders, contracting authorities should consider the complexity of the information requested from providers, and indicate dates that would ensure the return of good responses from tenderers.

On receipt of the tenders, the authority evaluates them in order to award the contract to the tenderer which submits the best tender on the basis of the award criteria set out by the authority in the call for competition.⁴⁷ While authorities may use traditional methods of assessment to choose the best tender, the rules permit them to use an electronic auction to choose the best tender, provided this possibility has been stated in the contract notice, in the invitation to confirm interest or, where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender.⁴⁸ Investigations conducted for this

⁴⁶ Article 34 (2) and (6), Directive 2014/24/EU; Article 52 (2) and (6), Directive 2014/25/EU.

⁴⁷ Article 34 (6) Directive 2014/24/EU; Article 52 (6) Directive 2014/25/EU.

⁴⁸ Article 35 (2) and (4) Directive 2014/24/EU Article 53(2) and (4) Directive 2014/25/EU.

research both on notices in the OJEU and with practitioners confirm that some authorities opt for this approach.

4. DPS practice in the UK: a pilot study

To assess the impact of the current rules, the author opted to elicit evidence on practical experiences with the DPS rules in the UK. Based on this premise, the author decided that the best persons who could offer evidence on the rules are practitioners, engaged with DPS practice. Consequently, in April 2016, the author conducted a search using the <http://ted.europa.eu> to identify authorities, which had published contract notices advertising the intention to set up a DPS, between 1 March 2015 and 30 April 2016. Through this exercise, the author identified 72 organisations and sent emails to these organisations on 4 May 2016, with follow up emails on 10 May and on 18 May 2016. The organisations were requested to complete a survey which detailed a series of questions on their experiences with DPS, including the impacts of the current rules on their DPS practice.

22 organisations responded to the survey by the closing date of 30 May 2016. The respondents comprised participants from fifteen local authorities, three NHS Trusts/Procurement hub, and four central government bodies/executive agencies. Other findings from the survey are presented below:

The first question was an introductory question which helped the author to categorise the respondents as indicated above. The second question requested comments on whether use of DPS in the respective organisations was increasing or decreasing. All 22 respondents indicated that there is increased use of DPS in their respective organisations. This finding is supported by evidence from other sources, which illustrates that the DPS has taken root in UK regulated procurement, and is influencing how contracting authorities meet their obligations for service provision. In general, many authorities are deploying the tool for requirements covered fully by the procurement rules, as well as those covered by the light touch regime. For instance, the City of Cardiff Council regularly uses DPS for residential and nursing care provision. The Council reports that it wanted to transform the way it secures residential and nursing care placements for older people, including those with mental health problems, and needed a mechanism which would enable it achieve greater control and visibility on the £18 million spent annually on these key services. It also desired a faster and more efficient process to save

valuable time for its personnel as well as an option that could provide service users and their families with greater choice over their care placements.⁴⁹ Working with its portal operator, the council fine-tuned its requirements and set up a DPS whereby residential and nursing care providers could register for the opportunity to provide the required services. Within three months, over 100 care providers were registered on the system and over 170 opportunities were advertised by the Council through the system. To award individual contracts, the Council issues invitations to tenders which advertise the opportunities to the providers admitted on the system. On receipt of tenders from providers, case managers from the Council work with service users (and in some cases with their families) to evaluate and select an appropriate provider. The Council indicates that DPS has achieved £383,500 per year of annualised savings for the council. A report from Essex Council suggests that as at November 2016, there were as many as 242 active DPS in the UK⁵⁰ and a search by the author on the <http://ted.europa.eu> for active contract notices for DPS published in 2017 showed two in January, three in February, five in March, one in April and ten in May.

Question three required respondents to indicate the requirements purchased through DPS and the route to market adopted prior to their use of DPS for these requirements. Evidence from the survey demonstrate that a wide range of requirements are purchased through DPS. These include: passenger transportation contracts such as “home to school” transport, and social care transport; temporary accommodation/housing contracts; social care services including adult/children home/domiciliary services, community-based short break opportunities for parents and carers of children and young people with special education needs and/or disabilities, recruitment services, language services, temporary highway goods, minor building works, medication such as antibiotics and iv fluids products, and procurement of waste commodities.

On the question regarding the previous route to market for these requirements, 16 of the 22 respondents indicate that they procured them through framework agreements, four respondents indicated that the requirements were sourced via tenders, and one respondent indicated that the

⁴⁹City of Cardiff Council Transforms its Residential & Nursing Care Provision, available at <http://www.proactis.com/About-Us/Resources/Case-Studies/City-of-Cardiff-Council-Transforms>

⁵⁰ Essex County Council, “Dynamic Purchasing System: analysis of existing dynamic purchasing systems in the UK, November 2016”, available at <https://www.local.gov.uk/sites/default/files/documents/Appendix%204%20-%20Analysis%20of%20Dynamic%20Purchasing%20Systems%20in%20UK.pdf>, accessed 31 May 2017.

requirement was sourced via a spot contract. The final respondent indicated that the authority had previously never procured the requirement.

Question four required respondents to comment on their motivations for adopting DPS by their respective organisations. 19 out of the 22 respondents highlighted the fact that DPS provides opportunities for them to access new providers at any time unlike framework agreements which lock out new providers. This is captured by Respondent #18, who stated as follows *“the ability for the DPS to remain open to new market entrants enables the council to maintain healthy competition in suitable markets. The ability to refine requirements at further competition stage also enable the council to derive most value from the market. Lastly the ability to go out to competition at 'the right time' again maximises value”*.

12 of the 22 respondents noted that the changes introduced by the new rules had also encouraged their organisations to adopt DPS. One respondent mentioned the fact that DPS increases competition among market respondents and helps the organisation to access a wider range of suppliers who would not ordinarily compete in an open OJEU tender opportunity as the motivating factor for the organisation’s recourse to DPS. Another respondent referenced the fact that DPS provides a structured yet flexible mechanism that makes access to contract opportunities easy for local suppliers and SMEs as the motivation for using the mechanism. One respondent indicated a central government policy which recommends that authorities use DPS, whenever possible, as the underlying motivation for the use of DPS by the organisation.

Findings similar to those indicated above were also observed in research conducted by the Local Government Association with councils and public sector partners on the uptake and use of DPS, including the benefits and opportunities which contracting authorities can derive from the tool.⁵¹

Questions five, six and seven required respondents to comment on the main difficulties experienced by their organisations in setting up and operating DPS, and whether any of the difficulties are associated with organisational issues (including the organisation’s procurement policy or structure), personnel (including resistance to change and insufficient knowledge

⁵¹ Local Government Association, “A Guide to Dynamic Purchasing Systems within the public sector: Is it right for you and your suppliers“ available at https://www.local.gov.uk/sites/default/files/documents/4%2030%20DPS%20Guidance_04_Web.pdf

about DPS), technology (including lack of appropriate technology, need for investment in new technology, malfunctions in e-platform malfunctioning, and interoperability) or the supply market.

Only three of the responses identified organisation-related issue as a challenge with setting up and operating DPS. The main concern for the organisation relates to the amount of time required for evaluating many tenders, especially in product areas with many providers. For instance, Respondent #14 stated that “due to the large numbers of suppliers on the DPS it can appear daunting because the buyer is required to invite ALL suppliers. Therefore, hypothetically you can receive a large number of bids which all need evaluating, so we have to think about the impact of this on staff time.” Respondent #21 noted that cultural change was the challenge that had to be overcome in the organisation, as some Council members were not keen on the mechanism, and some of the service departments within the organisation were not fully integrated with the idea of deploying DPS for external service provision within the organisation. , Respondent #19 identified that the main organisational-related difficulty was connected with the fact that the organisation lacked sufficient understanding of what a DPS is and how to operate the mechanism.

With regard to personnel-related difficulties, most responses (19 of the 22 respondents) indicated that they had experienced no personnel-related challenge.. Respondent #14 however mentioned that when using a DPS for the first time, it inevitably requires practice to become proficient but that this is fairly simple, but as there is an administrative burden when reacting to new applications, which impacts on staff time, the response from some personnel in the organisation has been mixed. The respondent noted that some staff complained that having many suppliers in the system make the process difficult to manage owing to limited staff resources. Respondent #14 also referenced the lack of understanding of personnel on the correct procedure to follow when running an opportunity on the DPS, for example, the need ensure that all bidders are invited and completion of the right documents, as a difficulty when deploying the mechanism. Respondent #12 mentioned that DPS requires more management resources to maximise its effectiveness, in comparison to a framework agreement. Further response from Respondent #12 indicates that because of insufficient resourcing of their DPS, the organisation failed to fully realise efficiencies.

On technology-related difficulties, many respondents (15 of the 22 respondents) indicated that they had not experienced any technology-related challenge mainly because before setting up and operating DPS, their organisations had acquired suitable technology/platforms. However, seven respondents highlighted some difficulties with portal suitability, including problems with the technical aspects of using their organisation-owned portal to manage their DPS. For example, Respondent #1 indicated that though the organisation had organised DPS on their e-procurement platform, it lacked the capabilities to manage a more complex project, and the organisation had to purchase a new platform. Respondent #18 stated that the organisation's existing e-tendering tools had to be adjusted to make it suitable to operate DPS, as the organisation did not have sufficient funding to purchase a new solution. Respondent #12 identified some issues with the e-procurement platform not being adequately set up to allow for the ongoing receipt and evaluation of DPS requests to participate from providers, and Respondent #8 remarked that the organisation encountered difficulties with IT System functionality in relation to managing rounds/call-offs.

In relation to challenges from the supply market, 17 of the 22 respondents reported that they had not experienced difficulties from the supply community. The respondents noted that the general response to DPS from suppliers has been positive, especially when there is sufficient market engagement. However five respondents identified a few difficulties experienced with the supply community: Respondent #18 commented that as follows *"the main difficulty was in ensuring potential suppliers understand the procedures, and that once this challenge was overcome, the response was positive as suppliers prefer the DPS option to contract lockout"*. Respondent #22 noted that some suppliers, especially SMEs were not happy that they had to use electronic systems. Respondent #12 mentioned that suppliers were initially confused about the fact that selection process on the DPS is separate from the tender process, but that with some education suppliers have now responded more positively to the tool. Respondent #11 also noted that suppliers are keen for the approach although the providers have expressed reservations around the number of suppliers who may be appointed to the DPS.

In questions eight, nine and ten, the author sought to explore respondents' comments in relation to any experienced impacts between operating DPS under the current rules compared with under the previous rules. The respondents were also given the opportunity to offer any final comments on how to improve DPS practice, based on their practical experience. Many respondents (even respondents which had not operated DPS under the previous rules) remarked

that the new legal regime has made setting up and operating DPS less complicated. A number of the respondents referred to the removal of the requirement for simplified contract notice for each call off contract under the DPS as a contributory factor to the ease they now experience in using the mechanism. Respondent #1 commented that the organisation did not operate any DPS under previous legal framework as the rules were too restrictive and made setting up and running the system too onerous, but that the organisation now deploys DPS because the current rules make setting up and operating DPS far more practical. Respondent #9 mentioned as an advantage the fact that the new rules allow contract award notices to be issued quarterly. From the evidence on the use of DPS in the UK, one may be tempted to conclude that the current rules effectively support authorities in achieving transformative change through the deployment of DPS in their procurement practice. While there has been significant progress on the mechanism with some positive evidence of DPS supporting contracting authorities to access a wide range of suppliers at competitive terms, evidence also suggests that there are a few areas of concern.

The first concern relates to the removal of a maximum duration of DPS. Potentially, under the current rules, contracting authorities can set up DPS which can run indefinitely. A random search on the www.ted.europa.eu shows that some authorities have set up extremely long DPS. For example, in 2015, Hampshire County Council set up a DPS for provision of home to school transport, education and adult/children transportation requirements, general transportation services, for an initial period of 5 years with an option to extend by annual increments up to a maximum of 10 years.⁵² The issue with DPS of such long duration is that there are no provisions in the rules on how to reassess the qualification of providers admitted to the system, during the life of a DPS. Arguably, the removal of a limitation on the duration for DPS, and the lack of specific provisions in the rules to provide guidance on how contracting authorities may reassess providers on the system, where the established DPS is of a long duration could lead to disparate practices across organisations, with implications for transparency and equal treatment. In some ways the provisions in the rules attempt to deal with an aspect of this issue in that the rules do recognise that an authority's circumstances could change which may necessitate an amendment to the duration of its DPS. Consequently, authorities are permitted to modify the duration of established DPS, by notifying the Commission using appropriate forms.⁵³ For modifications to the duration of the DPS which do not involve termination of the

⁵² <http://ted.europa.eu/udl?uri=TED:NOTICE:271579-2015:TEXT:EN:HTML&src=0>

⁵³ Article 34 (8), Directive 2014/24/EU; Article 52 (8), Directive 2014/25/EU.

system, contracting authorities are required to use the form used initially for the call for competition. Where the contracting authority wishes to actually terminate the system, it needs to publish contract award notice. However, assuming the contracting authority elects not to amend the long duration of the DPS, it may be useful for the CCS to provide some guidance on how to re-assess providers already admitted to the system, to ensure that such providers are not in a more favourable position than new providers that would be admitted on to the system.⁵⁴ Pending availability of such guidance, it is suggested that contracting authorities need to weigh up the risks that an overly long term DPS may create for them.

A second concern relates to the fact that the rules do not place authorities under any obligation to notify providers of a decision to award a contract under a DPS, to provide a de-brief or to run a standstill period, and authorities may generally not need to do so as many of the contracts awarded under a DPS are likely to be low value.⁵⁵ However where the contract is above the EU threshold, there is the risk that it could be declared ineffective where the rules about how the contract is awarded are breached. Smith suggests that authorities could observe a voluntary standstill period to avoid the ineffectiveness remedy, and as part of good procurement practice, recommends that authorities should provide some feedback to suppliers.⁵⁶ Again, the CCS guidance on DPS could be updated to reflect this suggestion, to ensure consistent practice across the UK.

A third concern relates to provisions which require that contracting authorities shall “*at the earliest possible opportunity*” or “*as soon as possible*” inform candidates of admittance to a DPS.⁵⁷ These provisions are imprecise and could potentially leave a provider uncertain as to whether or not it is formally appointed to the DPS and entitled to participate in the tenders run under the DPS. A better position would have been for the rules to indicate a specific period within which the contracting authority should notify providers of a decisions. In the absence of such clear period, to avoid confusion, contracting authorities should clearly demarcate between the point of decision making after the assessment of the requests to participate and the

⁵⁴ For a discussion on the legal rules that apply where a contracting authority may need to address new facts or changes to specifications or conditions or to the rules that it has laid down for conducting the award procedure prior to concluding a contract, see S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Volume 1, 3rd edn, (London: Sweet & Maxwell, 2014), paras.7-307-7-313.

⁵⁵ There is an obligation to publish award notices of contracts placed under the system, See Article 50 (3), Directive 2014/24/EU; Article 70 (2) Directive 2014/25/EU.

⁵⁶ <https://www.bevanbrittan.com/insights/articles/2016/procurement-byte-dynamic-purchasing-systems-dps-3-operating-a-dps/>

⁵⁷ Article 34(5) and 55(1), Directive 2014/24/EU; Article 52 (5) and 75 (1), Directive 2014/25/EU.

formal admission of providers unto the DPS.⁵⁸ To reflect good practice, maintain transparency and manage economic operators' expectations, the author suggests that contracting authorities could provide a timeline of the process and activities, leading to the setting up of the system in the procurement document. This would clarify the various stages and processes for interested providers, and in any case most contracting authorities usually specify timelines in their procurement documents.

The fourth concern which is technology-related hinges on the requirement that the DPS is to operate as a *completely electronic process*. The main issue here relates to the appropriate interpretation to ascribe to the provision. For instance, Arrowsmith interprets the requirement strictly, and states that the requirements "appears to mean that entities must require all firms to deal electronically."⁵⁹ In practice, contracting authorities have encountered operators, especially SMEs, which are unable to understand or to use the authority's e-tendering system. For instance, Respondent #22 indicated that some providers experienced difficulties with navigating the system. The question which this raises is, to what extent can the contracting authority deviate from the electronic means? And would it be acceptable, for example for a provider to complete a PQQ, then forward same by email to the contracting authority for input into the system? This is a practical issue that authorities need to consider so that small businesses are not prevented from joining a DPS because of their inability to return responses electronically.

5. Conclusion

The discussion in this article demonstrates that to an extent the current rules on DPS in Directive 2014/24/EU and Directive 2014/25/EU have improved DPS practice and are enhancing the uptake of DPS in the United Kingdom. This can contribute to transformative change especially for the procurement of requirements, traditionally sourced through frameworks.⁶⁰

⁵⁸Susie Smith, "Procurement Byte: Dynamic Purchasing Systems (DPS) 2 – Setting up a DPS2 available <https://www.bevanbrittan.com/insights/articles/2016/procurement-byte-dynamic-purchasing-systems-dps-2-setting-up-a-dps/>

⁵⁹ S. Arrowsmith, "Dynamic Purchasing Systems under the New EC Procurement Directives - a not so dynamic concept" [2006] Public Procurement Law Review 16-29

⁶⁰ L Edwards, "Dynamic Purchasing Systems and the Death of Frameworks", available at <https://www.procurious.com/procurementnews/dynamic-purchasing-systems-and-the-death-of-procurement-frameworks>

However, as highlighted in the analysis, some concerns remain and should be addressed. Consequently, the author argues for some limited changes to the rules to address namely: re-assessment of providers already admitted to established DPS; post award notification obligations to be observed by authorities when they use DPS; imprecise timeframe for notification of unsuccessful providers on the outcome of their application to join a DPS; and ambiguity regarding whether authorities may deviate from using non-electronic means in the context of a DPS.

In addition to relevant rules changes, however, it is necessary to enhance DPS practice and secure the efficiencies that the mechanism offers to contracting authorities and suppliers. In this respect the author suggests that contracting authorities prepare for DPS implementation by adopting initiatives that address organisational, personnel-related, technological and supply-community challenges to DPS deployment.

In this regard, as a first step, contracting authorities that desire to transform service provision through DPS need to secure support for DPS from their leadership and personnel. As a DPS often demands a change to the organisation's procurement culture and processes, contracting authorities also need to consider initiatives to address this issue. One way of achieving this would be for contracting authorities to engage in continuous education to augment the knowledge and understanding of their leadership and personnel about the mechanism including concerning its operation, resource demands, and requirements best suited for procurement using DPS. Case studies from the successful implementation of DPS by other contracting authorities can also be used to address organisation and personnel related issues.⁶¹

To address technology-related barriers, contracting authorities must ensure that they have a well-functioning electronic system capable of managing all the steps in the DPS, including handling multiple rounds of call off contracts, and enabling the opportunities to remain live. To this end, contracting authorities could procure a fully enabled in-house electronic tendering system with functionalities to set up and operate DPS or could adopt enhancements to their

⁶¹ Local Government Association, "A Guide to Dynamic Purchasing Systems within the public sector: Is it right for you and your suppliers" available at https://www.local.gov.uk/sites/default/files/documents/4%2030%20DPS%20Guidance_04_Web.pdf

existing e-tendering portals to ensure that DPS can achieve the relevant efficiencies. Alternatively, they could make use of operators which provide the DPS as a managed service.

In relation to the supply community-related challenges, it is suggested that to ensure that suppliers engage in DPS arrangements and participate in relevant contract opportunities, contracting authorities can promote DPS to suppliers using various strategies including engagement in early market consultation, training for suppliers, and provision of guidance materials on suppliers' roles in a DPS. Importantly, to encourage participation by SMEs and avoid the risk of shutting them out of contract opportunities, contracting authorities could also provide access to support, for example, through a dedicated point of contact and helpline service.